Cheong Yuk Wai & Anor v Low Sai Wee & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL NO D5–22–1538 OF 1998
RAMLY ALI J
19 OCTOBER 2006

Companies and Corporations — Shares — Ownership of shares — Beneficial ownership of the entire shareholding — Management buy out — Management team with five members — Whether two who resigned remained members of the management team

Evidence — Conflicting testimony — Approach to take — Whether plaintiffs' motive and the probabilities of the case demonstrate the unlikelihood of plaintiffs' version of the events

The central issue in this case is the beneficial ownership of the entire shareholding in the fourth defendant company, Chrysalis Contracts Sdn Bhd and consequently in a company known as Hitechniaga Sdn Bhd. The issue was centered around the intended acquisition of all shares in Hitechniaga by a group of persons. In a discussion with the late chief executive officer of MBf Holdings Berhad ('MBf'), they were assured that he would support a 100% Management Buy Out ('MBO') by the management team. The management team consisted of five persons (MBO team). There was a sale and purchase agreement between the fourth defendant and MBF Holdings for the purchase of Hitechniaga shares but this was later aborted. The plaintiffs whilst acknowledging that the original group consisted of five members being the first and second plaintiffs, the fifth, sixth and seventh defendants claimed that at a certain point of time in or around the middle of 1997, the group was reduced to three members with the fifth and sixth defendants opting out of the group. All the defendants contended that the beneficial owners of the fourth defendant company are the first and second plaintiffs and the fifth, sixth and seventh defendants. The first, second, fifth, sixth, seventh and eigth defendants filed their counter-claim against the plaintiffs. Some six weeks after the writ in this action was filed, a company known as Winning Role Sdn Bhd entered into a sale and purchase agreement and supplementary agreement with MBf Holdings for the purchase of the entire share capital in Hitechniaga. Winning Role was in fact a nominee company for the plaintiff and through Winning Role, the plaintiffs acquired the entire shareholding in Hitechniaga. After determination of the ownership of the fourth defendant, the court had to decide which party was responsible for the non-completion of the sale and purchase agreement with MBF Holdings and accordingly who was liable in damages.

Held:

(1) As a whole the evidence of the fifth, sixth and seventh defendants corroborate

each other i.e. that there were five members of the MBO team and that each member's shareholding was agreed. Accordingly, there was a vast body of evidence from no less than eight witnesses that points to the fact that the fifth and sixth defendants remained very much a part of the MBO team and that the three nominees (namely the first, second and eigth defendants) were acting for all the five and not three as alleged by the plaintiffs. The fact that the three nominees who had nothing to gain and two other witnesses who were advocates and solicitors who similarly had nothing to gain and who gave evidence in the defendants' favour must be given its due weight. No motive whatsoever had been suggested as to where these people would lie (see para 99).

(2) The plaintiffs' case had been totally inconsistent. The evidence clearly lacked probity and do not support the fact as presented by the plaintiffs. The plaintiffs' evidence if tested against the evidence as a whole, the plaintiffs' motive and the probabilities of the case will demonstrate the unlikelihood of their version of the events. In short, the plaintiffs' version of the event was not credible (see para 101).

(3) In order to determine who was actually responsible for the failure or non-completion of the sale and purchase agreement relating to the MBO, the court had to scrutinise the reasons as to why the said MBO was aborted. The court found that the prime reason for the failure of the MBO was not because of the defendants conduct but the actions of the plaintiffs in reneging on the arrangement at 28 August 1997 involving five members in the MBO Team. There was ample evidence to show directly or indirectly that the plaintiffs wanted more shares in Hitechniaga, especially after knowing in March of that year that Hitechniaga as a part of a consortium would be successful in obtaining a project from the Government worth RM200m (see para 150 & 151).

(4) The court was satisfied that the plaintiffs' claim for damages had not been proved in the slightest. All evidence was based on the plaintiffs' oral testimony alone and no documents or witness have been tendered to actually prove damages. The claim must fail. The fifth, sixth and seventh defendants' counter claim against the plaintiffs must be allowed with costs and damages to be assessed by the registrar (see para 166).

[Bahasa Malaysia summary

Isu utama kes ini ialah pemunyaan benefisial keseluruhan pemegangan saham di syarikat defendan keempat, Chrysalis Contracts Sdn Bhd dan selepas itu di sebuah syarikat yang dikenali sebagai Hitechniaga Sdn Bhd. Isu utama berpusat kepada niat pengambilan kesemua saham di Hitechniaga oleh sekumpulan orang. Melalui satu perbincangan dengan mendiang ketua pegawai eksekutif MBf Holdings Berhad ('MBf'), mereka diberi keyakinan bahawa beliau akan menyokong satu jualan penyerahan saham 100% oleh pengurusan ('MBO') oleh kumpulan pengurusan. Pasukan pengurusan mempunyai lima orang (kumpulan MBO). Terdapat satu perjanjian jual beli di antara defendan keempat dan MBf Holdings untuk membeli saham-saham Hitechniaga tetapi ia kemudiannya telah dibatalkan. Plaintif-plaintif, sementara menyatakan bahawa kumpulan asal mempunyai lima ahli iaitu

plaintif-plaintif pertama dan kedua, defendan-defendan kelima, keenam dan ketujuh, mengatakan bahawa pada satu waktu lebih kurang pertengahan 1997, kumpulan tersebut dikurangkan kepada 3 ahli-ahli dengan defendan-defendan kelima dan keenam menarik diri daripada kumpulan tersebut. Kesemua defendan-defendan pula menyatakan bahawa pemunyaan benefisial syarikat defendan keempat adalah plaintif-plaintif pertama dan kedua, defendan-defendan kelima, keenam dan ketujuh. Defendan-defendan pertama, kedua, kelima, keenam, ketujuh dan kelapan memfailkan tuntutan balas mereka terhadap plaintif-plaintif. Lebih kurang enam minggu selepas writ tindakan ini difailkan, sebuah syarikat yang dikenali sebagai Winning Role Sdn. Bhd, memasuki satu perjanjian jual beli dan perjanjian tambahan dengan MBf Holdings untuk membeli keseluruhan modal saham di Hitechniaga. Winning Role sebenarnya merupakan syarikat penerima namaan plaintif dan melalui Winning Role, plaintif-plaintif dapat memperolehi kesemua pemegangan saham di Hitechniaga. Selepas memastikan pemunyaan defendan keempat, mahkamah akan menentukan pihak yang mana yang bertanggungjawab atas kegagalan menyempurnakan perjanjian jual beli dengan MBf Holdings dan dengan itu bertanggungan dari segi ganti rugi.

Diputuskan:

(1) Secara keseluruhan keterangan defendan kelima, keenam dan ketujuh menyokong satu sama lain, iaitu terdapat lima ahli di kumpulan MBO dan pemegangan saham setiap ahli dipersetujui. Dengan itu, terdapat bukti-bukti yang meluas daripada tidak kurang daripada 8 saksi-saksi yang menunjukkan fakta bahawa defendan kelima dan keenam masih merupakan sebahagian kumpulan MBO dan 3 penerima namaan (iaitu defendan-defendan pertama, kedua dan kelapan) bertindak untuk kesemua 5 dan bukan 3 seperti yang dikatakan oleh plaintif-plaintif. Fakta bahawa 3 penerima namaan tidak mempunyai sebarang keuntungan dan 2 lagi saksi-saksi yang merupakan peguambela dan peguamcara yang juga tidak mempunyai sebarang keuntungan dalam memberikan keterangan yang memihak kepada defendan-defendan harus diberi pertimbangan sewajarnya. Tiada motif langsung yang dicadangkan mengapa mereka harus bercakap bohong (lihat perenggan 99).

(2) Kes plaintif-plaintif adalah tidak konsisten. Keterangan-keterangan dengan jelas tidak jujur dan tidak menyokong fakta yang dikemukakan oleh plaintif-plaintif. Keterangan plaintif-plaintif sekiranya diuji dengan bukti-bukti secara keseluruhan, motif plaintif-plaintif dan kebarangkalian kes tersebut akan menunjukkan ketidakmungkinan versi mereka dengan keadaan-keadaan. Pendek kata, versi plaintif-plaintif akan keadan-keadan adalah tidak boleh dipercayai (lihat perenggan 101).

(3) Untuk menentukan siapakah yang sebenarnya bertanggungjawab atas kegagalan menyempurnakan perjanjian jual beli berhubungan dengan MBO tersebut, mahkamah terpaksa meneliti alasan-alasan mengapa MBO tersebut dibatalkan. Mahkamah mendapati alasan utama kegagalan MBO tersebut bukan disebabkan oleh perbuatan defendan-defendan, tetapi

tindakan-tindakan plaintif--plaintif dalam memungkiri penyusunan pada 28.8.1997 yang melibatkan lima ahli-ahli kumpulan MBO tersebut. Terdapat keterangan yang mencukupi yang menunjukkan secara langsung atau tidak langsung bahawa plaintif-plaintif inginkan lebih banyak saham-saham di Hitechniaga, terutama sekali selepas mengetahui pada Mac tahun tersebut, bahawa Hitechniaga yang merupakan sebahagian daripada satu konsortium akan berjaya memperolehi satu projek daripada kerajaan yang bernilai RM200 juta (lihat perenggan 150 & 151).

(4) Mahkamah berpuas hati bahawa tuntutan plaintif-plaintif untuk ganti rugi tidak dapat dibuktikan langsung. Kesemua bukti-bukti berdasarkan hanya kepada keterangan lisan plaintif-pliantif tanpa sebarang dokumen-dokumen ataupun saksi dikemukakan untuk membuktikan ganti rugi. Tuntutan tersebut mestilah gagal. Defendan-defendan kelima, keenam dan ketujuh yang menuntut balas terhadap plaintif-plaintif dibenarkan dengan kos dan ganti rugi akan ditaksirkan oleh pendaftar (lihat perenggan 166).]

Notes

For cases on ownership of sales, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 751–756.

For cases on approach to take on conflicting testimony, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 824–825.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chong Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (refd)

Carapiet v Derderian AIR 1961 Cal 359 (refd)

Kang Kok Kwang v Bukit Baru Centre Sdn Bhd & 4 others [1991] 1 CLJ 343 (refd)

Karumalay a/l Vanniyan & Anor v Ananthan a/l Rathinam [2005] 3 MLJ 600 (refd)

Khoon Chye Hin v Public Prosecutor [1961] MLJ 105 (refd)

Lee Ing Chin @ Lee Teck Seng & Ore v Gan Yook Chin & Anor [2003] 2 MLJ 97 (refd)

Lim Cheng Huat Raymond v Teoh Siang Teik [1996] 3 SLR 605 (refd)

Percival v Wright [1902] 2 Ch 423 (refd)

Perkins, In re; Ex-parte Mexican Santa Barbara Mining Company [1890] QBD Vol xxiv 613 (refd)

Sundram Properties Sdn Bhd v Civil Wettasinghe @ Christie Wettasinghe & 2 Ors [1987] 1 CLJ 213 (refd)

Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd [1990] 3 MLJ 239 (refd)

Yeng Hing Enterprise Sdn Bhd v Liow Su Fan [1979] 2 MLJ 240 (refd)

Legislation referred to

Companies Act 1965 s 163(4)

Evidence Act 1950 ss 101, 102

Robert Lazar (Sheila Lingam with him) Shearn Delamore & Co for the plaintiff.

S Sivaneindiren (S Marcelle with him) (Cheah Teh & Su) for the first, second, fifth, sixth & eighth defendants.

Gopal Sneenevasan (Sivananthan) for the seventh defendant.

Firoz Hussein (Choo Kar Seng with him) (Puthucheary Firoz & Mai) for the third defendant.

Ramly Ali J:

[1] The central issue in this case is the beneficial ownership of the entire shareholding in the fourth defendant company, Chrysalis Contracts Sdn Bhd and consequently in a company known as Hitechniaga Sdn Bhd. The issue centered around the intended acquisition of all shares in Hitechniaga by a group of persons.

[2] The plaintiffs, whilst acknowledging that the original group consisted of five members being the first and second plaintiffs and the fifth, sixth and seventh defendants claim that at a certain point of time in or around the middle of 1997, the group was reduced to three members with the fifth and sixth defendants opting out of the group. All the defendants, on the other hand contend that the beneficial owners of the fourth defendant company are the first and second plaintiffs, the fifth, sixth and seventh defendants. The defendants say that the fifth and sixth defendants never opted out and that the original group of five remained intact. Where the parties diverge therefore is whether the fifth and sixth defendants were beneficial owners of the fourth defendant company.

PRAYER SOUGHT BY THE PLAINTIFFS

[3] The plaintiffs are claiming for the following prayers:

(a) A declaration that the plaintiffs have equitable and beneficial interest of 65% in the shares of the fourth defendant in line with the Joint-Venture Agreement between the plaintiffs and the seventh defendant to purchase Hitechniaga shares through the fourth defendant;

(b) A declaration that the seventh defendant has equitable and beneficial interest of only 35% in the shares of the fourth defendant in line with the Joint-Venture Agreement between the plaintiffs and the seventh defendant to purchase the Hitechniaga shares through the fourth defendant;

(c) A declaration that the fifth and sixth defendants do not have any equitable and beneficial interest in the shares of the fourth defendant in line with the Joint-Venture Agreement between the plaintiffs and the seventh defendant to purchase the Hitechniaga shares through the fourth defendant;.

(d) A declaration that the first, second and eighth defendants are merely registered owners of the fourth defendant and directors of the fourth defendant as trustees and nominees for the equitable and beneficial interest of the plaintiffs and the seventh defendant;

(e) a declaration that the first and second defendants had breached their legal and equitable duties to the plaintiffs when:

  (i) they refused, failed and/or negligently transferred 65,000 shares in the fourth defendant as instructed by the plaintiffs;

  (ii) they refused, failed and/or negligently pass a resolution to appoint two new nominee directors on the Board of Directors of the fourth defendant;

(iii) they reported the original share certificates of the fourth defendant lost despite knowing at all material times where the shares were kept;

(iv) that an injunction be granted to restrain the first and second defendants as registered shareholders of the 65,000 shares in the fourth defendant and/or their servants and/or their agents or otherwise from transferring, selling, pledging, charging, assigning, diminishing, disposing or dealing in any way with the 65,000 shares in the fourth defendant;

(v) that an injunction be granted to restrain the first, second and eigth defendants as registered shareholders of all the shares in the fourth defendant and/or their servants and/or their agents or otherwise from reducing the paid-up capital of the fourth defendant in any way whatsoever, directly or otherwise.

(f) That an injunction be granted to restrain the first, second and/or eigth defendants from acting or making any representation that they are the directors and/or registered shareholders of shares in the fourth defendant or make any representation that the first, second and/or eigth defendants have authority to act for and on behalf of the fourth defendant and to restrain them from interfering with the management and affairs of the fourth defendant;

(g) That the defendants be liable to the plaintiffs to pay damages, general and special, for all loss and/or damage, including the sum of RM600,000, RM250,000 and the deposit forfeited;

(h) costs of this application; and

(i) any further relief which this court deems fit and just.

COUNTER-CLAIM BY THE FIRST, SECOND, FIFTH, SIXTH, SEVENTH AND EIGHTH DEFENDANTS

[4] The first, second, fifth, sixth, seventh and eigth defendants have filed their counter-claim against the plaintiffs claiming for:

(a) a declaratory order that the shares held by the first, second and eighth defendant in the fourth defendant company are held on trust for and on behalf of the first and second plaintiff and the fifth, sixth and seventh defendants;

(b) a declaratory order that the shares held by the first, second and eighth defendant in the fourth defendant are collectively held beneficially for the first and second plaintiff and the fifth, sixth and seventh defendants in the following proportions:

(i) 1st Plaintiff — 19%

(ii) 2nd Plaintiff — 17%

(iii) 5th Defendant — 30%

(iv) 6th Defendant — 17%

(v) 7th Defendant — 17%

(c) an indemnity for all expenses, costs and charges incurred including the costs of defending this suit and instituting a counter-claim; and

(d) such further or other relliefs as this court deems fit and just.

[5] In addition to the above, the fifth, sixth and seventh defendants specifically are also claiming against the plaintiff for:

(a) general damages;

(b) interest on the said damages at 8% per annum from the date of accrual of such damages till the full settlement of the same.

FACTUAL BACKGROUND

[6] The historical background of Hitechniaga is found in the witness statement of Gan Chee Wai (DW1) ('the fifth Defendant').

[7] The fifth defendant and the sixth defendant formed Hitechniaga on 16 March 1987 and built it up from scratch. They started with one employee and a small office and in three years turned it into a recognised and successful home-grown Information Technology ('IT') company in open systems.

[8] Somewhere in or around 1990, both the fifth and sixth defendant felt that they needed a strategic partner to take Hitechniaga to a higher level. They felt that with their limited financial means, Hitechniaga had reached its threshold. They therefore agreed to sell Hitechniaga to the MBf Group. However despite the change in ownership, the fifth defendant and sixth defendant continued to manage the company.

[9] Hitechniaga continued to expand and by 1994 had more than 100 employees. Hitechniaga was the in-house systems integrator for the MBf Group. It also provides systems integration services for other companies like Yamaha Motors, Carsem and Hume Industries. By 1994, Hitechniaga had a yearly revenue from systems integration in excess of RM30m and had over 100 professionals working for the company.

[10] Sometime in early 1994, both the fifth and sixth defendant felt that they had reached another threshold. It was necessary to set a new vision for the company and a next four years plan. Much time was spent deliberating and identifying critical success factors for the company. In 1994 itself, Hitechniaga announced its corporate vision which was to be the No 1 Malaysian based IT Company in the Asia Pacific Region by 1998.

[11] To achieve this Corporate Vision, the fifth defendant and sixth defendant acknowledged that Hitechniaga must be receptive to changes and exploit emerging opportunities. As good employees are vital to an IT Company, the fifth and sixth defendant set out to look for additional resources to help Hitechniaga achieve its vision.

[12] Cheong Yuk Wai (the first plaintiff) and Hong Kean Yong ('the seventh defendant') were known to the fifth defendant and sixth defendant whilst they were working for Messrs Andersen Consulting who worked on several matters together with Hitechniaga.

[13] The seventh defendant had unique skills as a technologist and the first plaintiff had good ability to position and strategise. The fifth defendant approached them and offered them employment which they accepted. The first plaintiff joined Hitechniaga on 1 January 1995 as the Managing Director. The seventh defendant joined Hitechniaga on 1 February 1995 as the Director of Technology and Services. The sixth defendant took over the role of director of Business Development and the fifth defendant remained the President and leader of Hitechniaga.

[14] At the suggestion of the first plaintiff, Hoh Han Keyet ('the second plaintiff') was brought into Hitechniaga in late 1995 or early 1996 as the director of E-Commerce. The second plaintiff at that point in time was only known to the first plaintiff..

[15] Soon thereafter Hitechniaga pursued the development of its e-commerce business and was successful in forming some major e-commerce strategic alliances with companies like Connect Software Inc Verifone Inc and MasterCard through the efforts of its management team which consisted of the five persons.

[16] After the acquisition of Hitechniaga by MBf, the late Tan Sri Loy (the head of the MBf Group at the material time) verbally assured the fifth defendant that together with his key management team they would have 20% participation in Hitechniaga in the event any exercise was carried out to list Hitechniaga on the Kuala Lumpur Stock Exchange.

[17] In late 1996, in an effort to finalise the 20% share option to be in place at least a year before Hitechniaga's possible listing, the fifth defendant had discussions with the late Loy Teik Hok the alternate Chief Executive Officer or MBf Holdings Berhad ('MBf') and the son of the late Tan Sri Loy. It was during these discussions that the late Loy Teik Hok said that he would support a 100% Management Buy Out ('MBO') by the management team. He felt that MBf should concentrate on its core business i.e finance, property development and education.

[18] The seventh defendant with the help of the management team and Tan Yan Ling ('the second defendant') put up a proposal for the acquisition of Hitechniaga. The purchase price was to be RM15.6m. However, there was mixed response from MBf. The late Loy Teik Hok and his brother Loy Teik Ngan were supportive but their father, the late Tan Sri Loy wanted a higher price.

[19] After a series of negotiations, there was a handshake agreement with Loy Teik Ngan and the late Loy Teik Hok at RM20m. They however still needed to convince their father to agree to the price.

[20] Thereafter, the management team got feedback that the late Tan Sri Loy disagreed with the amount and wanted to hold out for a better price. **A**

[21] Despite repeated assurances from the late Loy Teik Hok that he will manage his father, several weeks went by without any official response form MBF. In or around April/May 1997, the late Loy Teik Hok told the fifth defendant that he had difficulty convincing his father and that there were heated arguments at home. He wanted more time. **B**

[22] The management team met regularly to discuss options. After much deliberation, they decided that they would need to take a pro-active step to expedite matters. A series of resignation was planned to assist in the negotiations. The rationale was that the IT business being very much a people business, the greatest assets of the company will be the management team and staff. The resignation of key management staff may lead to the collapse of the company causing it to be a financial liability to MBF. The sixth defendant left first followed by the fifth defendant. The others were to follow. **C** **D**

[23] The order of resignation was discussed. The resignation of the sixth defendant first and then the fifth defendant was thought to have maximum impact as they were the icons of Hitechniaga. They were the personalities that the public recognised as being successful entrepreneurs in the IT industry. They were also the two who had the experience and expertise to set up an alternate company for the team as a contingency should the late Tan Sri Loy refuse to sell at a price agreeable to the management team. The strategy was also to change the negotiating team to the first plaintiff and the seventh defendant so that there will be no loss of face for MBF should they decide to compromise with the management team. **E** **F**

[24] Frontline negotiations were passed from the fifth defendant to the first plaintiff. The strategy worked. MBF reopened negotiations and finally agreed to sell Hitechniaga to the management team. However, in return for Hitechniaga having to give up its rights to the banking software, amongst others, the selling price was reduced to RM5m. **G**

[25] The Memorandum of Understanding was signed on behalf of the management team by the first plaintiff on 31 July 1997 at Loy Teik Ngan's house. RM50.000 was required to be paid upon the signing of the Memorandum of Understanding. This was paid by the seventh defendant. **H**

[26] Immediately after the signing of the Memorandum of Understanding and on the same night itself, the first plaintiff and the seventh defendant went over to the fifth defendant's house to show him the duly signed Memorandum of Understanding. **I**

[27] On that night itself, the three of them (namely the first plaintiff, the fifth and seventh defendants) discussed the agreement they had with MBF. Page 11 of Bundle B1 contains short points of what was discussed. They were taken down by the first

plaintiff on the several concerns that the fifth defendant had expressed and which he wanted to ensure was addressed. It was also agreed that the seventh defendant would take care of the legal matters. The first plaintiff volunteered to source for financing. The fifth defendant was to concentrate his efforts on securing Hitechniaga's interest in the Electronic Procurement Project ('EPP') a project worth around RM200m to Hitechniaga.

[28] Mr Tee Geok Hock of Messrs G H Tee & Co was appointed as the solicitor to handle the legal matters. He was primarily briefed by the seventh defendant and the first plaintiff.

[29] The management team decided to use a company as a vehicle to purchase the Hitechniaga shares. A company called Smart Reach Sdn Bhd was incorporated with the help of the fifth defendant's friend, Mr Charlie Yap of DP Corporate Services Sdn Bhd.

[30] At the time of the Memorandum of Understanding and even at the time of the incorporation of Smart Reach Sdn Bhd the respective equity of the 5 members of the management team had not been determined. That was only determined on 28 August 1997, after two lengthy meetings amongst the five held on 27 August 1997 and 28 August 1997. At the end of the meeting on 28 August 1997 what was agreed was as follows:

(i) The fifth defendant: 30%

(ii) The first plaintiff: 19%

(iii) The sixth defendant: 17%

(iv) The seventh defendant: 17%

(v) The second plaintiff: 17%

(vi) Total 100%

[31] The Memorandum of Understanding entered into between the management team represented by the first plaintiff and MBF envisaged that a Sale and Purchase Agreement would be executed within 30 days. This period was extended till 15 September 1997. However, on the night before the Sale and Purchase Agreement was to be signed, it became apparent that Smart Reach Sdn Bhd could not be used as a vehicle for the acquisition of the Hitechniaga shares as it would require an Extraordinary General Meeting of MBF to be convened and this would delay the execution of the Sale and Purchase Agreement. The Extraordinary General Meeting was required as the seventh defendant and the first and second plaintiffs who were directors/shareholders of Smart Reach Sdn Bhd were also directors of companies related to MBF.

[32] At the request of the management team, Mr G. H. Tee agreed to sell the management team a shelf company called Chrysalis Contracts Sdn Bhd, the fourth defendant. Chrysalis Contracts Sdn Bhd thus became the vehicle to replace Smart Reach Sdn Bhd to be utilised to purchase the Hitechniaga shares. As the remaining

three members of the management team were also prevented from surfacing, nominees were required to represent the interest of the management team.

[33] The second defendant, ('Tan Van Ling'), Low Sai Wee ('the first defendant') and Datuk Zubir bin Haji Ali ('the eigth defendant') were selected to be the nominees. The first plaintiff and the seventh defendant approached the second defendant to request her assistance in becoming a nominee. The fifth defendant added his request to the second defendant to help out over the telephone. The seventh defendant approached the first defendant and the sixth defendant had approached her father, the eighth defendant. They all agreed to the appointment to help out the management team at no personal gain.

[34] The first and second defendants were selected because they were trusted employees of Hitechniaga at the material time. The eighth defendant was selected because he was the sixth defendant's father and was known to the fifth defendant for more than ten years. The eigth defendant agreed to be a nominee only because of his daughter's interest in the management-buy-out (MBO) of Hitechniaga. The three acted as nominees for all five members of the management team.

[35] As nominees all three were required to execute blank transfer forms for the shares in the fourth defendant and undated letters of resignation. As the second defendant, apart form being a nominee director/shareholder was also helping out administratively to facilitate the MBO, the share certificates, transfer forms and undated letters of resignation were entrusted to her.

[36] A Sale and Purchase agreement was therefore entered into between MBF and the fourth defendant on 13 September 1997. The consideration for the purchase of the Hitechniaga shares was RM5,000,000 and 10% of the purchase price (RM500,000) was payable immediately upon signing the Sale and Purchase Agreement. The second defendant executed the agreement on behalf of the fourth defendant.

[37] The RM50,000 paid pursuant to the Memorandum of Understanding was utilised to partly fulfill this obligation to pay RM500,000. The balance sum of RM450,000 was put up by the fifth defendant as the eleventh hour switch of vehicle from Smart Reach Sdn Bhd to the fourth defendant made it too late to obtain financing.

[38] The sale of Hitechniaga to the management team required the Foreign Investment Committee's ('FIC') approval. Messrs Arthur Andersen was engaged to assist in obtaining the FIC approval. On the recommendation of Messrs Arthur Andersen, the paid up capital of the fourth defendant was increased from RM1,000 to RM100,000. The first and second plaintiffs and the seventh defendant contributed RM20,000, RM49,000 and RM30,000 respectively to finance the increase of the paid-up capital.

[39] The Sale and Purchase Agreement was scheduled to be completed within 30 days from the date of FIC approval. As FIC approval was obtained on 26 December 1997, the sale and purchase of the Hitechniaga shares was to be completed at the latest on or before 25 January 1998. However, the agreement could not be completed by this date due to the fact that the first plaintiff who was responsible to secure financing had not done so.

[40] The Sale and Purchase Agreement contained a clause (Cl 2.2.(b)) that allowed the management team to extend the completion date for two periods of one month each by paying a further 10% of the purchase price on each extension. Both periods of extension under this clause were exercised and the completion date was extended for two months. However, once again the sale and purchase was not completed as the first plaintiff had still failed to secure financing.

[41] At this stage, the fifth and seventh defendants had lost confidence in the first plaintiff securing financing and began making enquiries and approaches on their own.

[42] As far as MBf was concerned, the management team secured a two month extension from MBf on the basis that the management team pay MBf RM250.000 which will be utilised to offset interest on the balance purchase price for the duration of the extension. The final date for completion was now 25 May 1998.

[43] As indicated earlier, the fifth defendant's primary role was to secure Hitechniaga's stake in the E-Procurement Project initiated by the Government of Malaysia. In late 1997, a Consortium was formed between Hitechniaga, NTT Data and Puncak Semangat. If the Consortium was successful in obtaining the E-Procurement Project from the government the development and operation of the system would be sub-contracted to Hitechniaga. This sub-contract is worth RM200m.

[44] Sometime in March, 1988, the management had already heard news that the Consortium would be given a letter of intent for the project. The official letter arrived towards the end of March, 1998.

[45] The five members of the management team agreed on their respective equity in Hitechniaga on 28 August 1997. In March 1998, however, the first and second plaintiffs showed signs of reneging on this agreement. The following are several events that evidenced this.

[46] Firstly, the seventh defendant brought to the fifth defendant's attention the existence of a document authorising the sale of all of Hitechniaga's shares from the fourth defendant. The sale was in the following order:

(a) 87% to Smart Reach Sdn Bhd;

(b) 10% to the first plaintiff; and

(c) 3% to the second plaintiff.

The fifth defendant, sixth defendant and/or the seventh defendant were never consulted nor briefed on this document.

[47] Secondly, on 29 March 1998, the first plaintiff called for a meeting wherein the first plaintiff said that he could not partner with the fifth defendant and therefore the fifth defendant should have no share. What was most shocking to the fifth, sixth and seventh defendants was the first plaintiff's intention to renege on their agreement reached on 28 August 1997, a course of action suggested by the first plaintiff which seemed to have obtained the support of the second plaintiff. This meeting ended with no decision. Nevertheless, alarm bells were raised.

[48] Thirdly on 1 April 1998, a meeting between the first plaintiff, sixth and seventh defendants, the first plaintiff although acknowledging that there were five partners to the MBO clearly reiterated that he wanted the fifth defendant out. The conversation during this meeting was tape recorded by the seventh defendant and the transcript appears at pp 2–12 of Bundle C (exh D-211). The sixth defendant who was present at this meeting confirms that the first plaintiff did not want the fifth defendant as part of the management team.

[49] Finally, on 2 April 1998, the first plaintiff took away the share certificates, blank transfer forms, nominee forms and undated letters of resignation of the directors of the fourth defendant from one Yap Siew Ping who was vested with the custody of the said documents whilst the second defendant was away on maternity leave. Again this was done without consultation and/or the knowledge of the fifth, sixth and seventh defendants.

[50] The events saddened the fifth, sixth and seventh defendants. They had to make a decision with regard to the nominees' documents. They discounted making a police report. They were still hopeful that the first plaintiff may feel remorse and regret his actions. The decision was to suggest to the nominees to declare the share certificates and unsigned letters of resignation lost and have new share certificates issued.

[51] The suggestion was made to the nominees. The nominees agreed to have the share certificates declared lost.

[52] On 14 April 1998, the first and second plaintiffs made a very sudden and hurried attempt to complete the Sale and Purchase Agreement without the fifth, sixth and seventh defendants' knowledge and/or the knowledge of the nominees. They were not successful, partly due to the suspicion they aroused by hurrying the transaction and partly because of the share certificates having been declared lost by the nominees.

[53] On 14 April 1998, the first and the second plaintiffs and another party called Tanah Setia Sdn Bhd caused a lawyer's letter of demand to be issued against the first and second defendant for alleged failure on their part to perform their obligations as a nominee. Another letter of demand, also dated 14 April 1998 was issued by the first

A and second plaintiffs and Tanah Setia against the company secretary requiring the company secretary to effect the ownership of the fourth defendant's shares to Tanah Setia failing which they would commence legal proceedings.

[54] The fifth, sixth and seventh defendants were extremely shocked and
B disappointed by the action taken by the first and second plaintiffs and the claim from Tanah Setia whom they had never heard of. The nominees too were shocked and disappointed.

[55] The five members of the management team met on 15 April 1998 to discuss the issues and see how they could resolve their problems. The first meeting was at the
C fifth defendant's office. The fifth, sixth and seventh defendants were very angry with the first and second plaintiffs for issuing a legal letter against the first and second defendants who were merely doing them a favour by acting as nominees. They wanted a retraction of the legal letter. It was also at this meeting that the fifth, sixth and seventh defendants were first appraised of the involvement of Tanah Setia
D as an alleged financier. The meeting abruptly ended as the first plaintiff had a personal commitment.

[56] The five however met again on the same day at night at the first plaintiff's house. At this meeting, the fifth, sixth and seventh defendants were told that Lee
E Choong Phing a director of Tanah Setia had lodged a police report. In addition thereto they were told that the loan from Tanah Setia was for the 70% balance payment of RM3.5m to MBF. Upon release of the monies, 65% of the fourth defendant's shares would be transferred and registered in Tanah Setia's name. On top of it, 100% of Hitechniaga shares would also be transferred and immediately registered in the name of Tanah Setia. Tanah Setia would also be able to appoint their
F own directors into the fourth defendant and Hitechniaga.

[57] Based on these terms, both the fourth defendant and Hitechniaga would be lost to Tanah Setia, a company associated with the second plaintiff's father. This had no characteristics of a financing scheme but a scheme to take control of the fourth
G defendant and Hitechniaga by Tanah Setia. The meeting however ended on a positive note with both the first and second plaintiff agreeing to retract the legal notices, cancel the Tanah Setia arrangement and discharge Messrs CC Wee & Co., their lawyers at the material time. The management team agreed to meet again the next day to find a solution as to how to extricate themselves.

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[58] The meeting took place as agreed on 15 April 1998 except that the second plaintiff was unable to attend as he was attending to some foreign visitors. The seventh defendant brought along a lawyer friend known to him, one Ms Liza Chan.

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[59] At this meeting, the first plaintiff outlined the whole scheme in relation to the Tanah Setia loan. According to the first plaintiff in addition to what he had told the management team on 15 April 1998 night, he told the meeting that the plan was for the second plaintiff and him to intentionally default on the loan and cause all the shares of the fourth defendant and Hitechniaga to be transferred to Tanah Setia.

[60] Ms Liza Chan told the first plaintiff that his scheme would deprive the fifth, sixth and seventh defendant of their shares in Hitechniaga. She also told him that what he was doing amounted to cheating. The first plaintiff broke down and apologised for all the trouble he had caused. Ms Liza Chan advised them to go and see the management team's lawyer Mr G. H. Tee and seek his advice.

[61] Again, with the exception of the second plaintiff, the remaining four members of the management team went to meet Mr G. H Tee at his office. After being briefed, Mr G. H. Tee told the management team that the terms were extremely unfavourable. He advised them to obtain alternative financing and/or to possibly renegotiate the Tanah Setia arrangement.

[62] It must be noted that apart from the unusual and highly risky method of providing alleged security, the Tanah Setia arrangement required a finder's fee of RM600,000 to be paid to the second plaintiff's father, carried interest at 16.5% per annum and had to be repaid in two months.

[63] On 16 April 1998 night, the fifth defendant had dinner with the first plaintiff. The first plaintiff once again apologised for his actions. The fifth defendant told him that they should put the matter behind them and move forward as a team again.

[64] However, over the next few days after 16 April 1998, the fifth defendant's attempt to contact the first plaintiff to check on theprogress of their discussion with the second plaintiff's father was not successful. However, contact was eventually made by the seventh defendant and a meeting was arranged at the second plaintiff's house on 21 April 1998.

[65] All five members of the management team attended this meeting. The first and second plaintiff did a complete turnaround and said that they were going to go ahead with the Tanah Setia arrangement as they were already obligated.

[66] There were several exchange of letters between the solicitors for the first and second plaintiffs and solicitors for the first, second, fifth, sixth and seventh defendants. During this period the deadline for completion of the purchase of the Hitechniaga shares had not set in. Both parties were attempting to make their own arrangements for completion and both parties set out their terms and conditions for doing so.

[67] As far as the nominees were concerned, they were prepared to complete the acquisition on the basis of what was represented to them when they were asked to be nominees. As far as the fifth and sixth defendants were concerned, they were prepared to complete the acquisition on the basis of the first and second plaintiffs recognising their commitment under the 28 August 1997 equity agreement.

[68] The sale and purchase was not completed on or before 25 May 1989. MBF granted an extension of time till 8 June 1998 but the sale and purchase was not completed by the extended date.

STATEMENT OF AGREED FACTS

[69] The Sale and Purchase Agreement between the fourth defendant and MBF Holdings for the purchase of Hitechniaga shares was aborted. From the statement of agreed facts, it is agreed by the parties that on 3 July 1998, some six weeks after the writ in this action was filed, a company known as Winning Role Sdn Bhd entered into a Sale and Purchase Agreement and Supplementary Agreement with MBF Holdings for the purchase of the entire share capital in Hitechniaga. Both these agreements and two letters from Winning Role Sdn Bhd dated 15 August 1998 and 20 August 1998 appear in Bundle B3.

[70] What can be discerned from those documents are:

(a) the sale price for the shares in Hitechniaga was RM4,500,000 (which was RM500.000 cheaper than the Sale and Purchase Agreement between the fourth defendant and MBF Holdings); and

(b) by the supplementary agreement, the balance purchase price of RM4,050,000 that Winning Role had to pay under the Sale and Purchase Agreement of 3rd July 1998 could and indeed was paid directly to Hitechniaga and not MBf Holdings, purportedly in consideration for a debt by one of MBF Holdings associated companies to Hitechniaga.

[71] Further and most importantly what is conceded in the Statement of Agreed Facts is that Winning Role was in fact a nominee company for the plaintiff and through Winning Role, the plaintiff's acquired the entire shareholding in Hitechniaga.

ANALYSIS OF EVIDENCE

[72] This case turns upon an analysis of the evidence of the witnesses and the relevant documents to determine whether an agreement was reached on 28 August 1997 between the MBO Team (the first and second plaintiffs and the fifth, sixth and seventh defendants) as to their equity participation in the fourth defendant; and whether the fifth and sixth defendants had actually opted out of the team.

[73] Accordingly, after determination of the ownership of the fourth defendant, the court shall decide which party was responsible for the non-completion of the Sale and Purchase Agreement with MBF Holdings and accordingly who is liable in damages. The issue turns upon whether or not an oral agreement was reached between the plaintiffs and the fifth, sixth and seventh defendants as to the proportion of each person's beneficial shareholding in the fourth defendant. Given that, much of this case depends upon an analysis of the evidence, particularly the testimonies of all the witnesses.

[74] In this regard, assistance may be found in the decision of the Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ore v Gan Yook Chin & Anor* [2003] 2 MLJ 97 which decision was upheld by the Federal Court. The Court of Appeal had this to say (at p 116):

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a 36 civil or criminal case: the approach to judicial appreciation of evidence is the same.

[75] In the present case, all five members of the MBO teams (ie both the plaintiffs and the fifth, sixth and seventh defendants) gave evidence. The nominees (the first, second and eighth defendants also gave evidence. The third defendant who was the company secretary also gave evidence. All of them are parties to the action. Two other witnesses (i.e. DWG and DW9) are independent witnesses called by the third and seventh defendants. Both DWG and DW9 are solicitors who have no interest in the outcome of the litigation.

[76] The court must properly assess and weigh all the evidence given by all the witnesses before accepting or rejecting the whole or any part of it. Beside relying on the demeanour of the witnesses, the court must also take into account the presence or absence of any motive that a witness may have in giving his evidence.

[77] The court shall now deal with the evidence of DW6 and DW9 first.

EVIDENCE OF DW9 - LIZA CHAN

[78] DW9 is an advocate and solicitor of 24 years standing. While she admits in her evidence in chief that she is socially acquainted with the seventh defendant, it was never suggested to her in cross examination that she either had an interest in the litigation or that it would effect their evidence. In cross examination, DW9 said that the seventh defendant did seek her professional advice in relation to this dispute but it was never suggested to her that this might also affect her evidence.

[79] Given this, the court is of the view that the evidence of DW9 must carry significant weight and the court should treat her as an independent witness of truth, as she has clearly no motive to give evidence otherwise.

[80] DW9 became involved in this matter in mid April 1998, when the seventh defendant went to her for advice after discovering the removal of the fourth defendant's company documents by the first plaintiff and the discovery of the

arrangement the plaintiffs had arrived at with Tanah Setia. What is crucial is that the information given to her by the seventh defendant at a meeting on 15 April 1998 was given well before any legal proceeding had commenced and was in the context of seeking her help in finding a way forward for the MBO Team. It was not a time when the seventh defendant could be said to be positioning himself for litigation. It is therefore evidence of significant value.

[81] This is what DW9 says of that meeting in her evidence in chief:

> When defendant 7 came to my office, it was on 15 April 1998. He told me that he was working with a company called Hitechniaga. He also told me that a few of his friends were carrying an MBO of Hitechniaga from MBF. He also told me the shareholding of five different persons in the company. I took note. He told me that the person got the most shares would be George Gan (defendant 5) - i.e. 30% shares. Where as the others would be getting 17% and one person would get 19%. I asked if there is a shareholding agreement. The seventh defendant told me none because they were all very good friends.

[82] This is significant as the evidence given by DW9 was a conversation she had with the seventh defendant which was contemporaneous with the facts of this case. It is worth noting that the witness' memory of this is derived from a note she says she took

[83] Further on she says:

> Contrary to understanding he was now offered more shares and effectively his co-operation was sought to deny Defendant 5 and Defendant 6's any shares.

and in cross examination she says:

> He (the 7th defendant) told me the Plaintiff 1 offered him extra shares and wanted his co-operation to deny Defendant 5 and 6's shares.

[84] DW9 was asked by the seventh defendant to attend a meeting on 16 April 1998 where she was told all shareholders would be present.

She was asked to help them find away forward. This is her evidence of the meeting of 16 April 1998.

> The meeting was scheduled on the next day -16 April 1998. I did go for this meeting. Defendant 7 sent his car for me to attend the meeting held at Hitechniaga office. At that meeting, plaintiff 1 was present, Defendant 5, Defendant 6 and Defendant 7 were also present. Only four persons were there. I was told that Plaintiff 2 had oversea's visitor in the office. He came in and out of our meeting very briefly. This meeting lasted about 1/2 hour to 45 minutes.

and later she said:

> The meeting proceeded on the footing that everyone had shares in Chrysalis Contract. I meant the 5 of them, Plaintiff 1 and Plaintiff 2 and Defendants 5, 6 and 7.

[85] The advice given by DW9 as to the way forward is to be found in her examination in chief:

I was told that the 5 shareholders owe a few million dollars to complete the MBO and that Plaintiff 1 and Plaintiff 2 managed to get a financier from a company called Tanah Setia; that the person behind Tanah Setia is Plaintiff 2's father.

Plaintiff 1 explained that the security for the loan would be to transfer out to Tanah Setia the Chrysalis Contract shares. I was also told the loan carried an interest of 10% p.a. I recalled telling the 4 persons present that this was not the way things should be done. There should be a proper loan agreement and if shares were used as security, a proper memorandum of deposit of share be signed. I advised them to go back to their lawyer handling the site transaction, Mr. Tee to get the proper documents done. It was Plaintiff 1 who told me about Tanah Setia's involvement at the meeting. When I told them to go back to their lawyer, G. H. Tee, Plaintiff 1 was very upset. He said it would be easy to get out of the matter because some of the investors who were plaintiff 2's father's friends were from overseas. I talked to plaintiff 1 and suggested that plaintiff 2 and him apologise. I was told by plaintiff 1 that plaintiff 2 may get disowned. As to the trouble which they put plaintiff 2's father to arrange the loan, they ought to pay him some compensation, to be fair.

[86] What emerges from DW9's evidence is:

(a) that the parties were clear in their mind in April 1998 that all five members of the MBO Team were entitled to shares and the proportions had been agreed;

(b) that after the removal of the fourth defendant's company documents by the first plaintiff and the arrangement of the plaintiffs with Tanah Setia, the plaintiffs were willing to and did meet with the fifth, sixth and seventh defendants and DW9 to see if there was a way to resolve this issue;

(c) that all parties at the meeting including the plaintiffs operated on the premise that all five of the MBO Team were entitled to shares in Hitechniaga; and

(d) that the plaintiffs feared going back on the arrangement with Tanah Setia as it involved the second plaintiff's father.

EVIDENCE OF DW6 - TEE GEOK HOCK

[87] DW6 was the solicitor acting for the fourth defendant. Much of the cross-examination of DW6 was directed towards the role played by his firm as solicitor for the fourth defendant when the plaintiffs attempted to complete the Sale and Purchase Agreement by using the blank documents executed by the nominees.

[88] For our purposes there are two areas of the evidence of DW6 that warrant close review. Both were given under cross-examination and both make clear that his instructions as transaction solicitor was that the MBO Team consisted of five people. He says:

At the 1st meeting there was no fixed price mentioned. The parties were negotiating the price. I was told of the identity of the vendor i.e. one of the MBF group of companies. I was told there would be five persons involved in the MBO. There were Defendant 5, Defendant 6, Plaintiff 1, Defendant 7 and Plaintiff 2. At that briefing, I see three persons i.e. Defendant 7 and Plaintiff 1 who gave the bulk of the briefing. Short while later, Defendant 5 came in.

and

> The briefing was done by Plaintiff 1 and Defendant 7. The common picture is that there would be five persons involved in the case management of the company (D4). The original plan is that the 5 persons would come together to acquire the shares of Hitechniaga. Utilisation of Smart Reach and Defendant 4 was just the means to acquire Hitechniaga. I was never told after that, that Defendant 5 and 6 were no more interested for the acquisition.

[89] In his evidence DW6 also confirms that the fifth, sixth and seventh defendants and the first plaintiff came to see him a few days after 14 April 1998 wherein he was told that they had settled the issues between them. He was also told about the loan and he told them that registering all the shares of Hitechniaga in the name of the lender was not a proper way of giving security for the loan as the risk is high. He told them that the terms were unusual and that he couldn't assist them with the documentation due to the very nature of the loan.

[90] From the evidence of DW6 and DW9 (who are not parties to the present action), it is crystal clear that there were five members of the MBO Team (i.e. the plaintiffs, the fifth, sixth and seventh defendants) as contended by the defendants.

EVIDENCE OF THE NOMINEES

The Second Defendant (Tan Yan Ling)

[91] The second defendant was the most involved of all nominees as she assisted in the administrative matters of the management team right from the outset. Her evidence takes us back to even before her appointment as a nominee and she confirms the following:

(a) that when the sixth defendant resigned from Hitechniaga, the sixth defendant passed her letter of resignation to her (the second defendant) to pass to the first plaintiff. When the second defendant brought the letter to the first plaintiff's attention, he told her that 'he must make the resignation look real'.

(b) the second defendant also gave evidence that the fifth defendant informed her at the time of his resignation what she had already known from the sixth defendant's resignation i.e. that it was for the purpose of bringing MBF back to the negotiation table.

(c) the second defendant also gave testimony that at all material times, she understood that there were five members of the MBO team and that she was never told by anyone that the fifth and sixth defendant had dropped out.

(d) the second defendant gave testimony that she attended the meeting when Mr G. H. Tee, the solicitor was briefed on the transaction. She attended the meeting together with the plaintiff and the seventh defendant. At this meeting, Mr G. H. Tee was told that there were five members of the MBO Team.

(e) the second defendant confirms that on the night before the Sale and Purchase Agreement was supposed to be signed, she was approached by the first plaintiff and the seventh defendant to become a nominee for the five members of the MBO Team. She also confirmed that in the presence of the first plaintiff and the seventh defendant, she spoke to the fifth defendant as well. She said that

although she knew the respective equity of each of the five members as the seventh defendant had told her on 29 August 1997, the day after they arrived at an agreement, the first plaintiff reaffirmed it by writing it out on the board on 12 September 1997 when she was asked to be a nominee.

[92] The evidence of the second defendant stands as uncontradicted by the plaintiffs as to what she was told when appointed as a nominee.

THE FIRST DEFENDANT (LOW SAI WEE)

[93] The first defendant was never involved in the administrative matters in relation to the MBO Team. He however was an employee of Hitechniaga and gave evidence as follows:

(i) that sometime in September 1997, the first defendant received a telephone call from the seventh defendant. The seventh defendant told him that they needed someone with information technology background to be a nominee director and shareholder of a company that was being used to purchase the Hitechniaga shares;

(ii) the seventh defendant said that this was required on the advise from Arthur Andersen;

(iii) the seventh defendant told him that he will be acting as a nominee for all five of them i.e. the plaintiffs and the fifth, sixth and seventh defendants;

(iv) the seventh defendant also said that the second defendant and the sixth defendant's father were also nominees and that together the three of them will hold all the shares for the five of them;

(v) the seventh defendant also told him why (the fourth defendant) had to be utilised in place of Smart Reach Sdn Bhd;

(vi) the only other person the first defendant spoke to or who spoke to him about becoming a nominee was the second defendant; and

(vii) the second defendant reaffirmed what the seventh defendant had already told him.

[94] The evidence of the first defendant stands uncontradicted by the plaintiffs as to what he was told when appointed as a nominee. In fact, no suggestion was put to the first defendant that he was told anything that contradicted his evidence by anyone prior to the dispute.

THE EIGHTH DEFENDANT (DATUK ZUBIR BIN HAJI ALI)

[95] The eighth defendant was not an employee of Hitechniaga and/or any of its subsidiaries and/or related companies nor was he ever a director or shareholder of Hitechniaga and/or any of its subsidiaries and/or related companies. The eighth

defendant's only connection with Hitechniaga was his daughter the sixth defendant and he gave evidence as follows:

(a) that he at the material time was the Grand Chamberlain, at the Istana Negara and only agreed to become a nominee director/shareholder because of his daughter, the sixth defendant's involvement in the acquisition of Hitechniaga and her appeal for assistance;

(b) that he also states that only his daughter, the sixth defendant, spoke to him about becoming a nominee and briefed him on the intended acquisition of Hitechniaga and who he was acting as a nominee for. The eighth defendant said that his daughter told him that she and four of her partners proposed to buy Hitechniaga through a MBO and that for some technical reason, she needed him to be one of the nominee directors/shareholder. The eighth defendant also said that he was given a briefing of the details of the MBO wherein he was told that the fourth defendant would be the vehicle intended to be used to purchase all the shares in Hitechniaga for RM5m. The sixth defendant also told him that her other partners were the fifth and seventh defendants and the first and second plaintiffs and that their respective equity was 30%, 19%, 17% and 17%. The sixth defendant had 17% as well; and

(c) it was never suggested to the eighth defendant that he was wrongly briefed on the whole transaction and/or that he became a nominee for some other reason. His evidence was uncontroverted.

[96] The plaintiffs have failed to cross-examine all the three nominees on their evidence. Their evidence stands uncontradicted as to what they were told when appointed as nominees. Therefore, the court is of the view that the evidence as given by the nominees must be deemed to be the truth.

[97] At this juncture, the court would refer to the following passages in the case of*Aik Ming (M) Sdn Bhd & Ors v Chong Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 wherein Gopal Sri Ram JCA stated as follows (p 794):

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it as argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

[98] In the case of *Carapiet v Derderian* AIR [1961] Cal 359 (as cited and followed in *Aik Ming*'s case), Mukhaiji J, at p 362 of the report expressed the principle in the following words:

> The Law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party of whose behalf the

cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety.

EVIDENCE OF THE DEFENDANTS AS A WHOLE

[99] As a whole the evidence of the fifth, sixth and seventh defendants corroborate each other (ie that there were five members of the MBO Team and that each member's shareholding was agreed). Accordingly, there is a vast body of evidence from no less than eight witnesses that point to the fact that the fifth and sixth defendants remained very much a part of the MBO Team and that the three nominees (namely the first, second and eighth defendants) were acting for all the five and not three as alleged by the plaintiffs. The fact that three nominees who have nothing to gain and two advocates and solicitors who similarly have nothing to gain gave evidence in the defendant's favour must be given its due weight. No motive whatsoever has been suggested as to where these people would lie.

EVIDENCE OF THE PLAINTIFFS

[100] The first and second plaintiffs do not dispute that at the outset, the fifth, sixth and seventh defendants and the two of them all pursued the MBO. However, they allege that as MBF was not responding, the five of them agreed to leave MBF on a staggered basis. After the fifth and sixth defendants left, the first and second plaintiffs and the seventh defendant allegedly met and decided to give it another try to the exclusion of the fifth and sixth defendant. The seventh defendant denies any such meeting and/or agreement.

[101] The plaintiffs' case has been totally inconsistent. The evidence clearly lacks probity and does not support the fact as presented by the plaintiffs. The plaintiffs' evidence if tested against the evidence as a whole, the plaintiffs' motive and the probabilities of the case will demonstrate the unlikelihood of their version of the events. In short, the plaintiffs' version of the event is not credible. Some of the fundamental inconsistencies, omissions and/or lack of probity in the plaintiffs' evidence are as follows:

(a) first, to the plaintiffs' assertion that the RM450,000 paid by the fourth defendant to MBF Holdings as a deposit was a loan from the fifth defendant to the first plaintiff. The plaintiffs want the court to believe that although the fifth defendant was no longer part of the MBO Team he agreed to loan RM450,000 to the first plaintiff. The first plaintiff's evidence in cross-examination on this issue is more incredible when he said the said loan of RM450,000 was given to him by the fifth defendant without any terms and conditions. Logically, it is very difficult for the court to believe the plaintiffs' version of the event.

(b) second, to the plaintiffs' assertion of the role of the eighth defendant as nominees. The eighth defendant was DW3 and he is the father of the sixth defendant. According to the plaintiffs, the eighth defendant was a nominee for the plaintiffs and the seventh defendant was a nominee for the seventh defendant alone. The plaintiffs' position on this issue is not clear and not convincing. Either way, the court is being asked to believe that the father of the sixth defendant was willing to be a nominee for parties in adventure that his daughter is supposed to have left. This is inherently not probable and the more likely version is that the eighth defendant was a nominee in a venture with all five members of the MBO Team including his daughter. Why else would he agree to be a nominee?

(c) third, to return to the role of the eighth defendant. The plaintiffs have been wholly inconsistent as to his role. In one part of their pleading, the plaintiffs assert that the eighth defendant held shares as trustee for only the seventh defendant. Yet in another part of the pleading, the plaintiffs assert that the eighth defendant was a nominee of all the plaintiffs.

In correspondence immediately prior to litigation, the position taken by the plaintiffs' solicitors are that the eighth defendant was a nominee for the seventh defendant alone. In evidence however, PW1 says that the first, second and eighth defendants were holding the shares in the fourth defendant equally for the plaintiffs and the seventh defendants.

Clearly, this inconsistency points towards the plaintiffs creating a role for the eighth defendant to support their action. The only consistent and credible version must be that the eighth defendant was a nominee for all five members of the MBO Team where his daughter (the sixth defendant) is one of them.

(d) fourth, to the plaintiffs' assertion as to the entitlement of the plaintiffs and the seventh defendant in the shareholding of the fourth defendant. In cross-examination the first plaintiff said that the nominees (the first, second and eighth defendants) were holding the shares in the fourth defendant for himself, the second plaintiff and the seventh defendant in equal shares. Clearly, the first plaintiff asserts that each of the plaintiff and the seventh defendant is entitled to 33.3% in the fourth Defendant. However, in the pre action correspondence, the plaintiffs' solicitors assert that the seventh defendant is entitled to 35%. Indeed, the declaration they seek in their pleading is that the seventh defendant is entitled to 35% of the fourth defendant. This inconsistency cannot be explained away and again must be a result of the plaintiffs' creating a position for this litigation.

(e) fifth, to the meeting of the first plaintiff, the seventh and the fifth defendant after the first plaintiff had executed the MOU with MBF Holdings. The first plaintiff under cross-examination confirms that such a meeting took place but on the one hand says that the seventh defendant was present and on the other says he was not. Apart from this inconsistency, the point to be made on this meeting relates to hand written notations made on the back of MOU. The note itself is clearly a memorandum of issues that had to be addressed in respect of the MBO. In cross-examination, the first plaintiff was asked the following question and he answered:

Isn't it true that this was a note written by you on the back side of the MOU on the night of the MOU when you met up with the fifth defendant and seventh defendant?

Yes- it is possible.

Despite this, the first plaintiff curiously maintained that none of the issues noted down relate to concerns of the fifth defendant with regard to the MBO.

Irrespective of this obvious inconsistency, the point to be driven home about this meeting relates to the first plaintiff's reasons for having called the fifth defendant for the meeting. In cross-examination he said he wanted to show the seventh defendant that he could do the MBO where the fifth defendant had failed. He also wanted to tell the fifth defendant that he wanted to work with the fifth defendant still. The question to be asked is why the fifth defendant would agree to meet with the first plaintiff and seventh defendant and obviously have a discussion regarding outstanding issues for the MBO when he had nothing to do with the MBO?

The first plaintiff is asking the court to believe that the fifth defendant as the original founder of Hitechniaga, and the person who employed the first plaintiff was willing to have the first plaintiff demonstrate his ability to purchase Hitechniaga when the fifth defendant himself was not able to do so. This is not a credible explanation and this meeting can only be consistent with the fifth and sixth defendants being part of the MBO Team.

(f) sixth, to the meeting with DW9, Liza Chan. It was never suggested to her in cross-examination that the first plaintiff was not present at this meeting nor that the second plaintiff never came in and out of it. It was also not suggested to her that the advice she gave for the five of them to resolve the matter was not given. Given that, the court must ask why all five parties would meet with DW9 to try to resolve the matter if not all five were members of the MBO Team and had a stake in Hitechniaga. There can be no other explanation for this meeting.

(g) seventh, to the plaintiffs assertion that they met with the seventh defendant and all three of them decided to proceed with the MBO. The first point to be made is that the existence of this meeting was not put to the seventh defendant in cross-examination. Further, even the plaintiffs own evidence of this alleged meeting is entirely inconsistent.

The first plaintiff (PW1) in his cross-examination said that the said meeting was held before 15 July 1997 and before the fifth defendant left the fourth defendant company. The second plaintiff (PW2) on the other hand had this to say

After about one week after the fifth Defendant left that first Plaintiff and seventh defendant came to my room and all 3 of us decided to go for it by ourselves.

[102] In other words, PW2's recollection of this alleged meeting is that it occurred after 15 July 1997, ie after the fifth defendant resigned while PW1 said the meeting occurred before the fifth defendant resigned. As the only two witnesses who gave evidence of this alleged meeting cannot themselves agree when it took place,

the court is of the view that the only credible explanation, taking into account the body of evidence as a whole, is that the meeting did not take place.

[103] As regards the plaintiffs' arrangement with Tanah Setia, there are evidence as to the terms of this arrangement and the intention of the plaintiffs to default on the loan so that Tanah Setia would finally become owners of Hitechniaga. This is a radical departure from any understanding the plaintiffs allege they had with the seventh defendant to acquire Hitechniaga. In short, it means that the plaintiffs were transferring ownership to Tanah Setia. If as the plaintiffs allege, they had an agreement with the seventh defendant, it would only be reasonable that the plaintiffs would have told the seventh defendant of this arrangement with Tanah Setia. They did not. As PW2 says in cross-examination in respect of the Tanah Setia agreement:

> I agree seventh defendant was not a party to this agreement. The first plaintiff and I negotiated the terms of this agreement. The seventh defendant was not consulted on this agreement or any financing to purchase Hitechniaga.
>
> I agree it was our intention to default in this agreement, by not paying the bank the loan in order to minimise the tax liability.

[104] The only reasonable explanation for this state of affairs is that the plaintiffs knew that the seventh defendant and the other members of the MBO Team would never agree to any such agreement with Tanah Setia. This also explains the haste with which the plaintiffs attempted to complete the Sale and Purchase Agreement one month ahead of schedule and also explains why the first plaintiff took custody of the fourth defendant's company documents without any notice to either the nominees or the fifth, sixth and seventh defendant.

THE PLAINTIFFS' LACK OF PROBITY WITH REGARD TO WINNING ROLE SDN BHD

[105] It must be stated at the outset that the plaintiffs never voluntarily disclosed that subsequent to the non-completion of the MBO by the extended deadline of 8 June 1998, the plaintiffs acquired 100% of Hitechniaga through a company called Winning Role Sdn Bhd. Further even when the issue was raised at cross-examination, the plaintiffs were less than candid in their evidence. In fact, some of their answers were not true.

[106] It is therefore important to set forth the manner in which the evidence of the plaintiffs' interest in Winning Role Sdn Bhd unfolded:

(a) in cross-examination at pp 240–241 of the Notes of Evidence, the first plaintiff gave evidence as follows:

(i) that a company by the name of Winning Role Sdn Bhd bought over Hitechniaga after the MBO lapsed;

(ii) Winning Role Sdn Bhd was a group of investors based in United Kingdom of whom some were the same persons behind Tanah Setia including the second plaintiff s father;

(iii) the shareholders of Winning Role Sdn Bhd were nominees of the United Kingdom investors;

(iv) one of the two shareholders of Winning Role Sdn Bhd was Saw Kok Thye, the first plaintiff's brother-in-law;

(v) the first plaintiff alleged that as employees of Hitechniaga, he and the second plaintiff would be able to buy back 80% of Hitechniaga if the company performed well;

(vi) the first plaintiff denied that he stood to gain more under the deal with Winning Role Sdn Bhd than with Tanah Setia;

(b) in cross-examination at p 12 of the Notes of Evidence for the hearing on 22 October 2001, the second plaintiff (PW2) gave evidence as follows:

(i) that Winning Role Sdn Bhd was the company that eventually purchased Hitechniaga;

(ii) the purchase took place after June 1998 or thereabouts;

(iii) the purchase price was either RM5m or RM4.5m;

(iv) both the plaintiffs obtained 80% of Hitechniaga shares after purchases; and

(v) that the other shareholder of Winning Role Sdn Bhd, Michael Cheong was the second plaintiff's cousin.

[107] The solicitors for the seventh defendant issued a subpoena for the attendance and production of documents relating to the acquisition of Hitechniaga by Winning Role Sdn Bhd against Saw Kok Thye, one of the two shareholders of Winning Role Sdn Bhd who is the first plaintiff's brother-in-law.

[108] It was only after the issuance of this subpoena against Saw Kok Thye that the truth was solicited from the plaintiffs by way of a statement of agreed facts dated 26 June 2006 and Bundle B3.

[109] Through the statement of agreed facts, it is clear that the plaintiffs gave false evidence as:

(a) it is now admitted that Saw Kok Thye and Cheong Mun Kheng, the directors and only two shareholders of Winning Role Sdn Bhd were the plaintiffs' nominees and not the nominees of United Kingdom Investors as previously alleged;

(b) it is now also admitted that through Winning Role Sdn Bhd, the plaintiffs acquired the entire shareholding in Hitechniaga and not 80% as previously alleged; and

(c) the earlier contention that the plaintiffs would only acquire 80% of Hitechniaga as employee if the company performed well was also clearly an untrue statement.

[110] In the Court of Appeal case of *Karumalay a/l Vanniyan & Anor v Ananthan a/l Rathinam* [2005] 3 MLJ 600, Richard Malanjum JCA (as he then was) stated as follows (p 610):

> It is settled law that once part of a witness' evidence is disbelieved the rest should be considered with caution (see *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105). And if any part of it is relied on, cogent reason for doing so should be given (see *Ee Choon Bak & Anor v Public Prosecutor* [1951] MLJ 183)

[111] In the case of *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105 referred to in the judgment above, Thomson CJ stated as follows:

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion.

[112] In the case before this, the plaintiffs by agreeing to the statement of agreed facts after they have given evidence to the contrary without any explanation clearly falls within the category of witnesses described in the two cases cited above. It is now admitted that Winning Role Sdn Bhd entered into a sale and purchase agreement with MBF on 3 July 1998 (ie less than one month after the MBO by the management team was aborted).

[113] Further, it is now stated clearly that the purchase price was further reduced to RM4,500,000, a reduction of RM500,000 being coincidentally equal to the sum MBF was entitled to forfeit upon the non-completion of the sale and purchase agreement by the fourth defendant.

[114] The plaintiffs by reneging on the 28 August 1997 agreement by the five members of the MBO Team effectively increased their collective interest in Hitechniaga from 36% to 100%. The plaintiffs have clearly profited from their breach.

FINDINGS ON THE EVIDENCE

[115] The is of the view that if the test as set out by the Court of Appeal (and affirmed by the Federal Court) in *Lee Ing Chin @ Lee Tech Seng & Ore v Gan Yook Chin & Anor* is observed and the evidence of the plaintiffs is tested against the documents and the probabilities of the case, it is clear that the plaintiffs' version of the events do not withstand scrutiny. Furthermore the demeonour of the plaintiffs while giving evidence do not convince the that they were telling the truth.

[116] Against this, the is satisfied the body of evidence led by the defendants is consistent when tested against the documents and the probabilities of the case.

CASE AGAINST THE NOMINEES (THE FIRST, SECOND AND EIGHTH DEFENDANTS)

[117] As against the three nominees, the plaintiffs seek the following orders, namely:

(a) a declaration that the first, second and eighth defendants are merely registered owners of the shares in the fourth defendant and director of the fourth defendant as trustees and nominees for the equitable and beneficial interest of the plaintiffs and the seventh defendant;

(b) a declaration that the first and second defendants had breached their legal and equitable duties to the plaintiffs when:

(i) he refused, failed and/or negligently transferred 65,000 shares in the fourth defendant as instructed by the plaintiffs;

(ii) they refused, failed and/or negligently pass a resolution to appoint two new nominee directors on the Board of Directors of the fourth defendant; and

(iii) they reported the original share certificates of the fourth defendant as lost despite knowing at all material times where the shares were kept.

[118] Prior to the commencement of the trial, it appears that the plaintiffs were contending that the first and second defendant were holding the shares in the fourth defendant for the equitable and beneficial interest of the first and second plaintiffs only and that the eighth defendant was holding the shares in the fourth defendant for the equitable and beneficial interest of the seventh defendant only. However, in the course of the trial, the plaintiffs claim that each of the nominees hold 1/3 share for the first and second plaintiffs and seventh defendant respectively.

[119] The plaintiffs failed to lead any evidence to show that the first and second defendant were aware or made to understand that they were holding the shares in the fourth defendant for the equitable and beneficial interest of the first and second plaintiffs or the third (ie the first and second plaintiffs and seventh defendant). The plaintiffs also failed to challenge the first and second defendants' evidence that at all material times they understood that there were five members of the MBO Team. Consequently, the finds that the plaintiffs' allegation that both the first and second defendants had breached their legal and equitable duties to the plaintiffs are unsustainable.

[120] As for the eighth defendant, the plaintiffs have infact not sought for any remedy nor have they put forward their case to the eighth defendant during cross-examination.

[121] It is also pertinent to note that none of the nominees received any remuneration for becoming a nominee. The nominees had at all times acted in accordance with their terms of appointment (ie nominees on behalf of the five members of the MBO Team).

[122] Premised on the above, the is of the view that when the nominees were informed of the first plaintiff's action in taking away the share certificates, blank transfer forms, nominee forms and undated letters of resignation of the directors of the fourth defendant from one Yap Siew Ping who was vested with the custody of the said documents whilst the second defendant was away on maternity leave without consultation and/or the knowledge of the fifth, sixth and seventh defendant, the nominees agreed to have the share certificates declared lost because in the minds of the nominees, this was the best way to preserve the status quo whilst the five members of the management team resolved their differences.

[123] The is satisfied that the nominees had at all times acted in good faith and in no way acted for their personal gain. It is the plaintiffs who are claiming that the nominees have breached their terms of appointment. As a general rule, therefore, the plaintiffs bear the burden of proving the breach by the nominees. Section 101 to s 102 Evidence Act 1950 is clear on this point. It is trite law that a party who asserts must prove.

[124] In order to succeed, the plaintiffs must first establish the terms of appointment of each nominee. Throughout the trial, the plaintiffs have clearly failed to do so.

[125] Based on the evidence adduced at trial, it is clear that:

(a) the nominees were holding the said shares in the fourth defendant for the equitable and beneficial interest for all five members of the management team ie the fifth defendant, sixth defendant, seventh defendant, first plaintiff and second plaintiff as they were required to do upon their appointment as nominees; and

(b) the nominees had at all material times acted in good faith and in accordance with their terms of appointment.

[126] Therefore, the plaintiffs' claim against the nominees must fail.

THE PLAINTIFFS' CASE AGAINST THE THIRD DEFENDANT

[127] The plaintiffs are seeking against the third defendant the following:

(i) a declaration that the third defendant's issuance of 'new' share certificates for 65,00 shares in the fourth defendant as unlawful;

(ii) a mandatory injunction ordering the third defendant to:

(a) cancel the 'new' share certificates for 65,000 of the shares in the foourth defendant company;

(b) register the transfer of 65,000 shares in the fourth defendant company as instructed by the plaintiffs;

(c) accept the resignation of the first and second defendants as directors of the fourth defendant company; and

(d) accept the appointment of an additional company secretary of the fourth defendant as instructed by the plaintiff; and

(iii) lastly, that the defendants be liable to the plaintiffs to pay damages, general and special, for all loss and/or damage, including the sums of RM600,000, RM250,000 and the deposit forfeited.

[128] The plaintiffs have alleged against the third defendant:

(i) that the third defendant was at all material times aware that the blank transfer forms, share certificates and letters of resignation were always and still in the custody and possession of the plaintiffs;

(ii) that the third defendant, as a company secretary for the fourth defendant company, failed, refused and/or neglected to execute, transfer and register the shares of the fourth defendant company into a company known as Tanah Setia Sdn Bhd;

(iii) that the third defendant did not take reasonable steps to confirm with the plaintiffs whether or not they have the blank transfer forms, share certificates and letters of resignation in their possession;

(iv) that the third defendant, in spite of having knowledge of the reported loss of the share certificates did not inform the plaintiffs, as such, at that point (at the meeting held on 14 April 1998) misled the plaintiffs into believing that all were in order.

[129] The third defendant is an advocate and solicitor of the High Court of Malaya and practicing in Kuala Lumpur. The third defendant was employed by Messrs GH Tee & Co, advocates and solicitors as a legal assistant during the period between beginning of 1996 until January 2001.

[130] In the course of the third defendant's duties in the firm of GH Tee & Co, she was, inter alia, appointed as the company secretary of the fourth defendant company, with effect from 15 May 1997 until 27 April 1998.

[131] The third defendant was never actively involved in the affairs of the fourth defendant company and merely undertook administrative functions as the company secretary of the fourth defendant company.

[132] The third defendant was aware from the records of the fourth defendant company that there were some resolutions pertaining to a sale and purchase of shares in a company named Hitechniaga Sdn Bhd passed in September 1977. However, she was not informed of the details of the same. The third defendant was aware that Mr Tee Geok Hock was involved in the preparation of certain agreements pertaining

to the sale and purchase of he Hitechniaga's shares under G. H Tee & Co but she was not involved personally nor was she briefed on the same.

[133] The third defendant was never involved in any manner in preparing any sale and purchase agreement pertaining to the Hitechniaga shares.

[134] The third defendant was not aware that the first, second and eighth defendants, the named shareholders, were merely holding the shares in the fourth defendant's company on trust.

[135] At all material times, the third defendant did not know that there was a trust arrangement between the plaintiffs and the first, second and eighth defendants or the plaintiffs have beneficial ownership in the fourth defendant company. The third defendant was only informed of the plaintiffs' alleged beneficial interest when she received a letter from the plaintiffs' solicitors stating the Plaintiffs' position.

[136] Her evidence on this point is clearly corroborated by the evidence of the first plaintiff, the third, fifth, sixth and seventh defendants and DW6.

[137] As a whole, the finds that:

(i) the plaintiff are not able to prove on a balance of probabilities that the third defendant had knowledge or was aware at all material times of the plaintiffs' alleged beneficial interest or there was any nominee arrangement of the shares in the fourth defendant company as alleged by the plaintiffs;

(ii) the third defendant has proved and established her case that she had no knowledge whatsoever at all material times of any trust arrangement or beneficial ownership in the fourth defendant company, particularly the plaintiffs' purported beneficial interest;

(iii) the plaintiff are not able to prove on a balance of probabilities that the third defendant had knowledge or was aware the plaintiffs had custody or possession of the blank transfer forms, share certificates and letters of resignation at the material times;

(iv) the plaintiffs have failed to establish or prove on a balance of probabilities that the third defendant had any knowledge of beneficial ownership in respect of the shares in the fourth defendant company, therefore, it would have been unlawful and unreasonable for the third defendant to accept and follow the instructions of the plaintiffs (who were not registered shareholders) on 14 April 1998. Since the plaintiffs were not the registered shareholders or named directors of the fourth defendant company, the third defendant has no legal duty or obligation to accept and follow the instructions of the plaintiffs;

(v) the plaintiff have also failed to establish or prove on a balance of probabilities that the third defendant had any knowledge that there was a Management-Buy-Out Scheme (MBO) in the company known as Hitechniaga Sdn Bhd where the fourth defendant company was supposed to be the intended purchaser or as the vehicle to acquire the shares of Hitechniaga Sdn Bhd. The plaintiffs have failed to establish or prove on a balance of

probabilities that the third defendant had any knowledge whatsoever that there was a loan arrangement including Tanah Setia Sdn Bhd. As such, in any event, the third defendant cannot be held liable for any loss allegedly suffered by the plaintiffs from any failure, neglect or refusal of the third defendant to register the transfer of the shares to Tanah Setia Sdn Bhd.

(vi) the third defendant does not owe any legal duty to the plaintiffs and she also has no legal obligation to seek confirmation with the plaintiffs whether they have the documents because the third defendant at all material times had no knowledge of any beneficial ownership or any trust arrangement behind the fourth defendant company and had no knowledge that the plaintiffs had or were supposed to have custody of the blank transfer forms, share certificates and letter of resignation.

(vii) that the plaintiffs failed to prove on a balance of probabilities that the third defendant had misled them into believing everything was in order as alleged by the plaintiffs.

[138] The third defendant as a company secretary to the fourth defendant company does not owe any expressed or implied duty in law to the plaintiffs and therefore, the third defendant had not breach any duty to the plaintiffs.

[139] In any event, the fourth defendant company cannot and does not recognise any trust over its shares as alleged by the plaintiffs by virtue of s 163(4) Companies Act 1965 ('Act') and art 6 of its Articles of Association:

(a) Section 163(4) reads:

Except as provided in this section no notice of any trust expressed implied or constructive shall be entered on a registrar or branch register or be receivable by the Registrar and no liabilities shall be effected by anything done in pursuance of subsection (1), (2) or (3) or pursuant to the law of any other place which corresponds to this section and the corporation concerned shall not be affected with notice or any trust by anything so done.

(b) Article 6 of the fourth defendant's Articles of Association reads:

No person shall be recognised by the Company as holding any share upon trust, and the Company shall not be bound by or be required in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any other rights in respect of any share other than an absolute right to the entirely thereof in the registered holder, except only as by these Article otherwise provided for or as by Act required or pursuant to any order to.

[140] By virtue of art 6 of the Articles of Association and s 163 of the Act, the third defendant could not in law recognise any beneficial interest as claimed by the plaintiffs on the following grounds:

(a) the fourth defendant company does not recognise any beneficial interest where the same is not registered. Therefore, the third defendant, being the company secretary could not recognise such beneficial interest because the fourth defendant company did not recognise such interest;

(b) the plaintiffs were neither the registered shareholders nor named directors of the fourth defendant company. Therefore, in law the third defendant clearly owes no duty to the plaintiffs. As such, there is no legal duty for the third defendant to comply with the instructions of the plaintiffs on 14 April 1998 or thereafter;

(c) if the defendant had carried out the instructions of the plaintiffs, the third defendant would have in breach of her duty towards the fourth defendant company because at that time, as far as the Company's records were concerned, the first, second and eighth defendants were still the named shareholders and directors;

(d) at all material times, the third defendant had never received any mandate, notice or instruction from the named shareholders and directors of any trust arrangement or beneficial ownership to recognise the interests of the plaintiffs in the fourth defendant company. Likewise, the third defendant never had any prior knowledge of such trust arrangement or beneficial ownership in the fourth defendant company. The facts were never challenged by the plaintiffs;

(e) at all materials times, the third defendant owed no legal duty to any party other than the fourth defendant Company. A company secretary owes a duty to the company but not its shareholders (see *Percivai v Wright* [1902] 2 Ch 423). Therefore, the contention that the third defendant has breached her duty to the plaintiffs who were not a registered shareholder or named director in the fourth defendant company is untenable;

(f) Since a company cannot take cognisance of the interest of person who is not a registered shareholder, therefore, neither can be company secretary (see *In re Perkins; Ex parte Mexican Santa Barbara Mining Company* (1890) QBD Vol xxiv 613; *Kang Kok Kwang v Bukit Baru Centre Sdn Bhd & 4 Ors* [1991] 1 CLJ 343, *Sundram Properties Sdn Bhd v Civil Wettasinghe @ Christie Wettasinghe & 2 Ors* [1987] 1 CLJ 213; *Yeng Ying Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240; *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239; and *Lim Cheng Huat Raymond v Teoh Siang Teik* [1996] 3 SLR 605);

(g) *In the Perkins; Ex parte Mexican Santa Barbara Mining Company* (1890) WQBD Vol xxiv 613, the English Court of Appeal held that:

> In the first place, it seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relations between trustees and their cestuis que trust in respect of the shares of the company. If a trustee is on the company's registrar as the holder of shares, the relations which he may have with some other person in respect of the shares are matters which the company have nothing whatever to do; they can look only to the man whose name is upon the register.

(h) In *Yeng Hing Enterprise Sdn Bhd v Liow Su Fan* [1979] 2 MLJ 240, the Federal Court held (at p 242):

> A company does not take cognisance of trusts except in so far as is provided for in s 163 of the Companies Act 1965 which should be read in conjunction with its articles of association which usually go beyond the statutory provision by stating that

the company shall not be bound to recognise any equitable interest or any other right in a share except an absolute right in the registered holder.

[141] As a whole, the plaintiffs have failed to establish or prove on a balance of probabilities all their allegations against the third defendant. Not an iota of evidence has been adduced to establish the plaintiffs' allegations and claims against the third defendant. The third defendant had acted within the law and diligently carried out her duties as the company secretary of the fourth defendant company. The third defendant owes no legal duty towards the plaintiffs.

[142] Therefore, liability wise the plaintiffs' claim against the third defendant must fail.

WHO WAS RESPONSIBLE FOR THE FAILURE OF THE MBO?

[143] The principal act relied upon by the plaintiffs to substantiate what they term as the crucial issue laying fault on the first, fifth, sixth and eighth defendants is the act of declaring the share certificates lost/misplaced. They claim that this act caused the MBO to be scuttled.

[144] From the pleadings, it is clear that the primary focus of the plaintiffs was in establishing that there were only three members of the MBO and not five. Consequentially in the pleadings, it is pleaded that the actions of the first, second, fifth, sixth and eighth defendants have caused the MBO to be aborted.

[145] The first, second, fifth, sixth, eighth and even the seventh defendants all took the position that there were five members of the MBO. They were prepared to complete on the basis of the agreement on the respective shareholdings reached by the five of them on 28 August 1997.

[146] The plaintiffs, on the other hand insisted they had 65% shares. Their path to completion insisted that this 65% be given recognition as they sought the immediate transfer of this 65% to Tanah Setia Sdn Bhd. With the transfer, all rights to 65% of the fourth defendant and 100% of Hitechniaga would be lost. In effect the plaintiffs were insisting on completion of their terms.

[147] The MBO was alive until it lapsed on 8 June 1998. The date 14 April 1998 has no real significance save and except that it is the first time that Messrs CC Wee & Co on behalf of the plaintiffs formally indicated that the plaintiffs were claiming a 65% share.

[148] The act of declaring the share certificates lost and issuing them in different denominations from the original was done in good faith and with a view for easy distribution after completion. In any event, it is a non-issue as the nominees confirm that all of them collectively act for all the five members of the MBO team.

[149] The plaintiffs pin on the defendants as being responsible for the failure of the MBO. The plaintiffs seek to focus upon the events leading to the declaration of loss of the share certificates of the fourth defendant and it's effect on the non-completion of the Sale and Purchase Agreement relating to the MBO. However, the plaintiffs failed to ascribe any motive or reason for why the defendants wished to abort the MBO.

[150] In order to determine who was actually responsible for the failure or non-completion of the MBO the has to scrutinise the reasons as to why the said MBO was aborted.

[151] Briefly, the finds that the prime reason for the failure of the MBO was not because of the defendants conduct but the actions of the plaintiffs in reneging on the arrangement on 28 August 1997 involving five members in the MBO Team. There are ample evidence to show directly or indirectly that the plaintiffs wanted more shares in Hitechniaga, especially after knowing in March of that year that Hitechniaga as part of a consortium would be successful in obtaining a project from the Government worth RM200m. The evidence indicates that the plaintiffs had reneged on the said agreement and sought to secure the MBO for themselves. In effect, the plaintiffs by breaching the agreement of 28 August 1997, put an end to the MBO as conceived by all five members, by the final completion date of 8 June 1998.

[152] To recapsulate, the following are the events that show the intention of the plaintiffs to renege on the agreement of 28 August 1997.

(a) firstly, the fourth defendant's circular resolution dated 20 March 1998 which sought to transfer shares in the fourth defendant to Smart Reach, the first plaintiff and second plaintiff. The other members of the MBO Team were not consulted about the resolution;

(b) secondly on 29 March 1998, the first plaintiff called for a meeting at which with the ostensible support of the second plaintiff, he said that he no longer wished to work with the fifth defendant who would thus get no share;

(c) thirdly, at the tape recorded meeting on 1 April 1998, the first plaintiff acknowledged to the sixth and seventh defendants that there were five members in the MBO Team but reiterated again that he did not want the fifth defendant involved; and

(d) fourthly, the removal of the fourth defendant's company documents by the first plaintiff from Yap Siew Ping on 2 April 1998 without any prior consultation with the fifth, sixth or seventh defendants.

[153] Taken cumulatively, the finds that the plaintiffs had by the above actions clearly evinced an intention to renege on the agreement of 28 August 1997 and the execution of the Tanah Setia loan agreement on 13 April 1998 was an affirmation of the plaintiffs' intention to renege on the agreement.

[154] It is incorrect for the plaintiffs to say that the declaration of loss of the share certificates was the sole and only reason for the MBO failing. What must be appreciated is that the MBO came to an end when the Sale and Purchase Agreement was not completed by the completion dated on 8 June 1998. Between the date of the declaration of loss of the certificates and 8 June 1998, the finds a series of correspondence between solicitors in which the plaintiffs were demanding completion but only on the basis that there were three members of the MBO Team (and with control passing to Smart Reach) which the defendants were prepared to do so on the basis there were five members of the MBO Team.

[155] The defendants' actions in declaring the share certificates lost or misplaced cannot be accepted as the main reason for the non-completion of the MBO. The first plaintiff had taken away the original share certificate and other company documents from the fourth defendant company. The plaintiffs had attempted to complete the MBO by themselves (to the exclusion of the fifth and sixth defendants) on 14 April 1998. Under such circumstances (at the material times) the defendants were entitled to take immediate steps to ensure that the MBO was not completed to the benefit of the plaintiffs alone to the exclusion of the fifth and sixth defendants. The nominees were acting bona fide in making such declaration. Their actions were meant to prevent serious injustice being perpetrated by the plaintiffs on the fifth and sixth defendants.

[156] In the final analysis, the is convinced that it was the plaintiffs who were responsible for the failure or non-completion of the MBO as earlier agreed by all five members on 8 August 1997.

DAMAGES CLAIMED BY THE PLAINTIFFS

[157] The plaintiffs' claim that the defendants be liable to the plaintiffs to pay damages, general and special, for all loss and/or damage, including the sum of RM600,000, RM250,000 and the deposit forfeited. In their submissions the plaintiffs seek special and general damage in the sum of RM3.95m.

[158] It is trite to say that a party has to prove their damages in evidence and mere estimates or speculation are not sufficient.

[159] In respect of the claim for a sum of RM600,000, as finder fee to Tanah Setia, the second plaintiff (PW2) in cross-examination said:

> Wasted expenditure. Payment of RM600,000 finder fee. No evidence that the payment was actually made.

[160] In respect of the RM500,000 deposit forfeited by MBf Holdings, the second plaintiff (PW2) in cross-examination said:

> I agree RM450,000 was the fifth defendant's money and RM50,000 was the seventh defendant's money.

[161] As for the RM1m paid to MBF Holdings towards purchase price of the MBO, the second plaintiff (PW2) said in cross-examination:

> The RM1m came from third party. No evidence of loan agreement... one John McDonagh lent me RM1m

[162] As for the RM250,000 paid to MBF Holdings for the execution of the Sale and Purchase Agreement, the second plaintiff (PW2) in cross-examination said:

> Sum of RM250,000 came from Smart Reach. It was arranged by me from John McDonagh.

[163] As for the RM250,000 legal fees and stamping costs, the second plaintiff in evidence in chief confirms that these costs were 'estimated'.

[164] In respect of the RM1.35m for 3% of Hitechniaga that NTT Data were to purchase, the MOU with NTT Data makes it abundantly clear at Cl 2 that the offer to purchase by NTT Data was conditional on the electronic procurement project being awarded by the Government to a consortium involving Hitechniaga. The second plaintiff (PW2) in his cross-examination confirms:

> I agree no evidence of EP Project was awarded to consortium consisting of Hitechniaga, NTT Data and Puncak Semangat.

[165] Also, there is no evidence called from NTT Data to suggest that they backed out because of the failure of the Sale and Purchase Agreement.

[166] On the above evidence, the is satisfied that the plaintiffs' claim for damages has not been proved in the slightest. All the evidence is based on the plaintiffs' oral testimony alone and no documents or witness have been tendered to actually prove damages. The claim must fail.

PLAINTIFFS' CLAIM MUST BE DISMISSED WITH COSTS

[167] Based on all that has been stated above and the evidence that has been given at the trial by all the witnesses, the plaintiffs' claim must be dismissed with costs as:

(a) the declaration sought in respect of the 65% interest in the fourth defendant for the plaintiffs and the 35% interest for the seventh defendant is contradicted by the plaintiffs own evidence. During trial, the plaintiffs claimed that all three had an equal share;

(b) there is overwhelming evidence that confirms that the original MBO Team by the five consisting of the fifth, sixth and seventh defendants and the plaintiffs were never aborted. There was never an agreement of three as alleged by the plaintiffs and as evidenced by the fact that their evidence is totally inconsistent as to what the alleged agreement of the three was;

(c) the first, second and eighth defendants have never claimed beneficial ownership of either the fourth defendant company or Hitechniaga. They have

honourably always acknowledged that they were holding the shares as nominees. When a dispute arose, they also acted prudently in taking a course of action that was consistent with the briefing they received when they were asked to become and accept becoming nominees;

(d) the first and second defendants had never breached the plaintiffs' legal rights and equitable duties to the plaintiffs. Quite clearly, even the plaintiffs now do not contend that the first and second defendants were their nominees only. The plaintiffs now claim that they were also nominees for the seventh defendant. The first and second defendants would have been in serious breach of their legal and equitable duties had they acted on the whims and fancies of the plaintiffs. They quite correctly used their entry as nominees as a reference point and bench marked their actions against the representations made to them then;

(e) the first and second defendants have recognised the interest of the plaintiffs and the fifth, sixth and seventh defendants from day one. They have never claimed the shares for themselves. Injunctive relief is completely unwarranted in the circumstances;

(f) the plaintiffs have not shown that they have suffered any losses. On the contrary, they have gained considerably through Winning Role Sdn Bhd and the plaintiffs unlawful actions. In any event, no evidence was led that RM600,000 and/or RM250,000 was paid by the plaintiffs from their own pocket or at all.

THE FIFTH, SIXTH AND SEVENTH DEFENDANTS' COUNTER-CLAIM

[168] In addition to some declaratory orders and costs, the fifth, sixth and seventh defendant specifically claim against the plaintiffs for general damages and interest at 8% per annum from the date of accrual of such damages till the full satisfaction of the same.

[169] As far as the fifth and sixth defendants are concerned, they were the ones left in the cold despite coming up with RM450,000. By reneging on the 28 August 1997 agreement, the plaintiffs succeeded in aborting the MBO and acquiring 100% of Hitechniaga through a subsequent purchase by Winning Role Sdn Bhd. The fifth defendant was deprived of his 30% stake and the sixth defendant of her 17% stake. The measure of their loss would be the RM450,000 they paid towards the 10% of the purchase price which has been forfeited and the premium Hitechniaga would be able to command immediately after the acquisition. Relying on the NTT Data agreement where they were willing to acquire a 3% stake in Hitechniaga for RM1.5m, the premium is ten fold. However in the course of trial, it was evident that the price was dependant on Hitechniaga being part of the Consortium that was successful in procuring the E-Procurement Project from the Government of Malaysia. Hitechniaga was not successful. In the circumstances liability wise, both the fifth and sixth defendants are entitled to the damages claimed. The assessment of damages ought to be left to the Registrar.

[170] As far as the seventh defendant is concerned, there is evidence to show that the seventh defendant had paid RM80,000 towards the deposit of the Sale and Purchase Agreement and capitalisation of the fourth defendant. This evidence has not been challenged. Therefore, the rules that the seventh defendant is entitled for this sum from the plaintiffs. As to his loss of participation in Hitechniaga, as general damages, the rules that an assessment of these damages ought to be carried out by the Registrar.

CONCLUSION

[171] For the varied reasons as adumbrated above, the makes the following orders namely:

(a) the plaintiffs' claim against all the defendants be dismissed with costs; and

(b) the fifth, sixth and seventh defendants' counter claim against the plaintiffs be allowed with costs and damages to be assessed by the Registrar.

Plaintiffs' claim against defendants be dismissed with costs.

Reported by Sally Kee